No. 76-709

Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1976

EARL L. BUTZ, ET AL.,

Petitioners,

vs.

ARTHUR N. ECONOMOU, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

LAW OFFICES OF
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In The

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EARL L. BUTZ, et al.,

Petitioners,

vs.

ARTHUR N. ECONOMOU, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

The respondents, by their attorneys, Law Offices of David C. Buxbaum, P.C., submit this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the District Court is not officially reported but appended to the petition for a writ of certiorari. The opinion of the Court of Appeals is reported at 535 F.2d 688 and is appended to the petition for a writ of certiorari. A motion for a rehearing, containing a suggestion of rehearing *en banc*, was

denied on July 23, 1976, said decision (which was attached to the petition as Appendix B) noting that no active judge or judge who was a member of the panel requested that a vote be taken on said suggestion.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the petition. The Clerk of this Court has extended respondents' time in which to file a brief in opposition to and including January 18, 1977.

QUESTIONS PRESENTED

In addition to the question presented in the petition, the respondents suggest that there are two other questions that are presented in this case, namely:

1. Whether federal officials acting outside the scope of their authority are immune from suit; and

2. Whether a determination of the applicable scope of immunity can be made by a motion to dismiss the complaint prior to any factual hearing designed to discover the role officials played in certain illicit acts.

STATEMENT OF THE CASE

Respondents' second amended complaint was dismissed by the District Court as to these petitioners on the sole basis that it was ". . . barred by the doctrine of official immunity . . . ." The petitioners' motion to dismiss was made prior to any discovery, and after time to respond to interrogatories served by respondents had passed. A copy of the full text of the motion to dismiss is attached hereto (Appendix A, *infra*, 1a-2a). No affidavit accompanied the motion to dismiss, although a memorandum of law was made part of the motion. Therefore, in

essence, the individual petitioners admitted, for purposes of their motion, that all facts as stated in the complaint were true, but argued that they were nevertheless immune from suit because of the doctrine of official immunity.

Respondent Arthur N. Economou is a principal of respondent Arthur N. Economou and Co., Inc. The petitioners were all officers of either the United States Department of Agriculture or of the Commodity Exchange Authority, a regulatory body which was then acting under the aegis of the Department of Agriculture.

Some two months before instituting proceedings against respondents, the petitioners had approved the application of respondent Arthur N. Economou and Co., Inc., for registration as a futures commission merchant. By approving the registration, the petitioners certified that respondent Arthur N. Economou and Co., Inc., actually met all the financial requirements which, two months later, they charged respondents with failing to meet. Clearly, petitioners knew that they were estopped from alleging, as they did in their complaints, that as of certain dates in 1969 and 1970 the respondents failed to meet those requirements.

Prior to February 19, 1970, when petitioners issued their first complaint against respondents, both respondents had ceased to engage in activities regulated by petitioners. On June 22, 1970, when the amended complaint was issued by petitioners, both respondents Arthur N. Economou and Arthur N. Economou and Co., Inc., were no longer subject to the petitioners' financial requirement regulations. Both complaints were issued without the notice or warning required by federal law.

The real reason for the institution, without notice, of these unwarranted proceedings were twofold. Firstly, in October 1969, The American Board of Trade, Inc., one of the respondents to this action, was established as an exchange and marketplace,

which departed significantly from the established method of doing business, and thus was considered a threat to the traditional institutions in the commodities business. In addition, on previous occasions respondents and their affiliates had publicly criticized the staff and operation of the Commodity Exchange Authority and had carried on a vociferous campaign urging that it be reformed. Subsequently, the Commodity Exchange Authority was abolished and a new independent agency, the Commodity Futures Trading Commission, was established by Congress.

The petitioners' malicious conduct did not cease with the issuance of these unfounded complaints. For instance, they furnished copies of the complaints to interested persons, without furnishing copies of respondents' answers to the complaints. Following the issuance of their amended complaint on June 22, 1970, petitioners issued a deceptive press release that falsely indicated to the public that respondents' financial resources had deteriorated, although petitioners knew, and acknowledged before a hearing officer, that the assertion was untrue. After said acknowledgment, the same deceptive press release containing the same false information, was once again released by petitioners.

On January 8, 1973, the sanctions recommended by petitioner Bain were affirmed by petitioner Campbell, even though the respondents had, since December 1970, neither been registered as futures commission merchants nor otherwise subject to petitioners' regulatory authority. The sanctions involved suspension of Arthur N. Economou and Co., Inc.'s non-existent registration, and required respondents Arthur N. Economou and Arthur N. Economou and Co., Inc. to cease and desist from violating requirements applicable only to registrants, and denied them trading privileges on contract markets for ninety (90) days.

The respondents petitioned for review of petitioners' decision and order, and the Court of Appeals for the Second Circuit in a 1974 decision dismissed proceedings against the

respondents with prejudice, holding that the prosecution of the complaints was contrary to federal law. *Economou, et al. v. United States Department of Agriculture,* 494 F.2d 519 (1974) (Appendix B, *infra,* 2a -4a).

This action was instituted by respondents in 1972. The second amended complaint (Appendix C, *infra,* 5a -13a) was dismissed by the District Court prior to any substantive hearing and prior to any discovery. The facts alleged in the complaint were not disputed on the motion to dismiss, since the petitioners submitted no affidavit with their motion.

ARGUMENT

I.

The Court at this time should not grant the writ because the facts adduced thus far are insufficient to permit this Court to determine the scope of immunity, if any, that should be afforded the various petitioners who are the defendants in the action. As this Court has held in another case related to immunity, *Doe v. McMillan,* 412 U.S. 306 (1972), "[t]he scope of immunity has always been tied to the 'scope of . . . authority.'" 412 U.S. at 320. Thus, the scope of immunity, if any, must be determined after full discovery, and perhaps at trial, but cannot be determined at this preliminary stage of proceedings.

The District Court had no opportunity to determine exactly what role the various petitioners played in the actions that were taken against the respondents. Until such a factual determination can be made, any granting of a petition for certiorari is premature. Only when the roles of the various petitioners are known can a determination be made as to whether or not they have any immunity, and if any immunity exists, what the degree of immunity is. This Court has held in *Scheuer v. Rhodes,* 416 U.S. 232 (1974), at page 243:

> ". . . [T]he scope of that immunity will necessarily be related to facts as yet not established either by affidavits, admissions or a trial record. Final resolution of this question must take into account the functions and responsibilities of these particular defendants in their capacities as officers of the state government, as well as the purposes of 42 USC §1983 . . . ."

This Court, at page 250 of its opinion in *Scheuer*, specifically set forth the various factual issues, raised but not yet settled at the "early pleading stage", which were relevant to a determination of whether the defendants acted within the scope of their duties and the range of discretion permitted them, and in good faith.[1] The Court concluded:

> "Further proceedings, either by way of summary judgment or by trial on the merits, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint." 416 U.S. at 250.

The motion to dismiss that petitioners seek to bring before this Court provides no information that explicates the duties and responsibilities of these various petitioners with regard to the

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1. "The documents properly before the District Court at this early pleading stage specifically placed in issue whether the Governor and his subordinate officers were acting within the scope of their duties under the Constitution and laws of Ohio; whether they acted within the range of discretion permitted the holders of such office under Ohio law and whether they acted in good faith both in proclaiming an emergency and as to the actions taken to cope with the emergency so declared. Similarly, the complaints place directly in issue whether the lesser officers and enlisted personnel of the Guard acted in good-faith obedience to the orders of their superiors." 416 U.S. at 250.

acts that occurred to the detriment of the respondents. The petition seeks to obviate this very essential problem by stating, on page 6:

> "As a part of the government's opposition to one of the earlier motions for an injunction, a detailed affidavit had been filed describing the actions taken by each individual defendant in the administrative proceedings that formed the basis of the judicial complaint (C.A. App. 10a-19a)."

However, absolutely no affidavits were presented with the motion to dismiss. Any prior affidavits were only relevant to a prior complaint, because the complaint had been amended twice since the commencement of this action. The prior complaints did not allege many of the causes of action now found in the present second amended complaint.

In *Apton v. Wilson*, 506 F.2d 83, 94 (D.C. Cir. 1974), it was noted that the case would have to be remanded for a determination of the scope of immunity because the defendant federal officers, like the petitioners in the instant case, had resisted efforts at discovery necessary to ascertain the nature of their responsibilities.[2]

The information necessary to determine the scope of immunity, if any, available to the various petitioners is absolutely lacking in the instant case. Therefore, respondents urge that the writ be denied.

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2. "An assertion of a qualified immunity would have to be accompanied by further factual presentation, concerning such matters as what the defendant knew about the nature of the demonstrations and the potential for disruption, what general arrangements were made between the defendants and those in direct command of the law enforcement personnel on the streets, and what the defendants knew about the actual conduct of the peace-keeping forces deployed during the demonstrations. The Justice Department defendants did not develop these matters in the District Court, but, consistent with their assertion of an absolute immunity, focused their presentation on showing that the defendants were acting in an official capacity, and resisted the plaintiffs' efforts at further discovery." 506 F.2d at 94.

II.

Other reasons also exist suggesting denial of the writ. The petitioners misread *Barr v. Matteo*, 360 U.S. 564 (1969), alleging that ". . . this Court held that those officals [sic] have absolute immunity." (Petition, 7). First of all, the *Barr* opinion does *not* state that federal government officials have absolute immunity for alleged torts committed in the performance of official duties. Secondly, while *Barr* dealt exclusively with acts held to be within the scope of official duties, it is alleged that some of the actions of the present petitioners were *outside* the scope of their official duties. Thirdly, *Barr* was exclusively a libel action, while this is not. It should further be noted that *Barr* was decided by the narrowest possible majority of the Court. Four Justices joined in Mr. Justice Harlan's opinion, Mr. Justice Black rendered a concurring opinion, and four Justices dissented, filing three separate opinions.

The opinion of the Court in *Barr* recognized that the issue was ". . . privilege as a defense by officers of the government to civil damage suits *for defamation and kindred torts* . . . ." (360 U.S. at 569, emphasis added). It noted that the privilege cannot ". . . properly be restricted to executive officers of cabinet rank . . . " (360 U.S. at 572). The Court went on to say:

> "To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted — the relation of the act complained of to 'matters committed by law to his control or supervision . . . .'" 360 U.S. at 573.

Therefore, the Court held that though the question was a "close one" (360 U.S. at 574), the particular individual in question, Barr, when acting within the scope of his authority as a high-ranking officer, was immune to suit *for libel*. Barr, it should be noted, was the head of a federal agency and thus his discretionary authority was presumably quite broad. The *Barr* decision did not state that all federal officers are immune from suit, even suit for libel, under all circumstances.

III.

Petitioners' suggestion (Petition, 9) that the Court of Appeals ". . . left undisturbed the district court's finding . . . that the allegedly tortious conduct of petitioners was 'both within the scope of their authority and discretionary . . .'" is not accurate. The Court of Appeals did not decide whether petitioners' actions were within the scope of their authority and discretionary, but said that even if such were the case, the petitioners would not be absolutely immune from suit.

Some mention ought to be made of precisely what a dismissal of this complaint would mean. Since the allegations of the complaint must be taken as true for purposes of this motion, a dismissal would mean that federal officers are not subject to civil liability although they: use their powers to curtail free speech; knowingly issue false press releases with intent to injure respondents; conspire to deprive respondents of property without due process of law; deliberately bring unauthorized proceedings against respondents without notice required by law, knowing that respondents were leaving their jurisdiction; seriously damage the respondents' business through harassment; issue illegal, punitive administrative orders against persons no longer subject to their authority; provide copies of their complaints to interested persons without furnishing respondents' answers, and fail to include the answers in the public file in violation of the Administrative Procedure Act; while holding office as law enforcement or investigative officers, act outside the scope of their authority; and trespass on the property of

respondents. Certainly, in an era of ever-expanding federal regulation, citizens must be given some civil recourse against officers who abuse their authority.

Motions to dismiss are disfavored in federal courts. *Pond v. General Electric Co.*, 256 F.2d 824, 826-27 (9th Cir. 1958); *Williams v. Gorton*, 529 F.2d 668 (9th Cir. 1976). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45.

IV.

The rules of this Court state that the writ of certiorari ". . . will be granted only where there are special and important reasons therefor." Supreme Court Rule 19(1). None of the criteria specifically set forth in Rule 19(1)(b) governing the grant of a writ of certiorari to review a decision of a court of appeals[3] seems applicable to the case at bar.

The Court of Appeals has not "decided an important question of federal law which has not been, but should be settled by this court . . . ." Supreme Court Rule 19(1)(b). The scope of executive officials' immunity from civil liability was decided by this Court in *Scheuer v. Rhodes, supra.*

The petition urges that only state officials are covered by the decision in *Scheuer v. Rhodes, supra.* and that federal officials ". . . require broader protection than the Court outlined

3. "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." Supreme Court Rule 19(1)(b).

in *Scheuer* for state officials sued under 42 U.S.C. 1983." (Petition, 15). However, nothing expressly or impliedly included in *Scheuer* gives any reason to believe that this Court would hold that federal executive officials are entitled to any greater scope of immunity than state officials. The various courts of appeals have certainly not felt that *Scheuer* left them free to apply absolute immunity whenever federal officials were involved. With virtual unanimity, they have interpreted *Scheuer* as applying to federal as well as state officials.

The Ninth Circuit has so held in *Mark v. Groff*, 521 F.2d 1376 (1975), an action brought by an accountant against IRS agents who allegedly took malicious and intentional action to ruin his tax return preparation business.[4] The court stated that *Scheuer* ". . . destroyed the notion of absolute immunity for executive officials . . ." (521 F.2d at 1379) and went on to deal with the agents' assertion that the *Scheuer* doctrine of qualified immunity applied only to state executive officials in §1983 actions. The defendant IRS agents, the court stated, offered

> ". . . no significant reason for distinguishing, as far as the immunity doctrine is concerned, between litigation under §1983 against state officers and actions against federal officers alleging violation of constitutional rights under the general federal question statute. In contrast, the practical advantage of having just *one* federal immunity doctrine for suits arising under federal law is self-evident. Further, the rights at stake in a suit brought directly under the Bill of Rights

4. "According to the complaint's allegations, which we must accept as true for the purposes of this appeal, the agents beginning in 1970 made false and derogatory statements to Mark's clients, unlawfully arrested appellant, and made false representations to a United States magistrate causing a high bond to be set; . . . told clients not to use Mark's services and warned the clients that if they continued to patronize Mark their returns would be audited." 521 F.2d at 1378.

> are no less worthy of full protection than the constitutional and statutory rights protected by §1983. Accordingly, we agree with several courts of appeals in holding that the official immunity doctrine in suits against federal officers for violation of constitutional rights is identical to the immunity doctrine applied in §1983 suits." 521 F.2d at 1380 (emphasis in original).

The court held that the IRS agents were ". . . entitled to no more than a qualified immunity for acts performed in the course of official conduct . . .", and remanded in accordance with *Scheuer's* direction that the scope of immunity would be related to the nature of the officers' responsibilities, which had not yet been established below. 521 F.2d at 1380.

The United States Court of Appeals for the District of Columbia in *Apton v. Wilson, supra,* 506 F.2d 83 (1974), a suit against officials of the United States Department of Justice, expressly held that the reasoning of the *Scheuer* decision,

> ". . . considered in the context of the present case, mandates rejection of the District Court's implicit conclusion that the Justice Department defendants are shielded by an absolute immunity while performing official functions. We hold that a qualified immunity, having the same general character as that contemplated by the Supreme Court in *Scheuer,* is available to the Justice Department defendants in the present action. Such an immunity appropriately allows vindication of the Fourth and Fifth Amendment rights at stake, while preserving for the officials involved a shield against liability that will allow vigorous, legitimate use of power." 506 F.2d at 92-93.

Similarly, in the case at bar, vindication of the respondents' First Amendment and Fifth Amendment rights would appear to be not only mandated by the *Scheuer* opinion but also reasonable and desirable.

The *Apton* court further stated that the defendants in that action,

> ". . . unlike the state officials in *Scheuer,* are the highest officers of a Federal executive department. The difference in office is relevant, for immunity depends in part upon 'scope of discretion and responsibilities of the office,' *Scheuer v. Rhodes, supra,* 416 U.S. at 247, 94 S.Ct. at 1692." 506 F.2d at 93.

The court in that case held that even with respect to the Attorney General,

> ". . . the absolute immunity often accorded prosecuting attorneys cannot shield the defendants in this case, for the prosecutor's absolute protection, like that of the judge from which it is derived, is both justified and bounded by the judicial traditions and procedures that limit and contain the danger of abuse." 506 F.2d at 92.

The Fourth Circuit stated, in *States Marine Lines, Inc. v. Schultz,* 498 F.2d 1146 (1974), that:

> "Although *Scheuer* involved a suit against state executive officers, the court's discussion of the qualified nature of executive immunity would appear to be equally applicable to federal officers." 498 F.2d at 1159.

In a footnote, the court continued:

> "This is indicated by the court's quotation from Barr v. Matteo which was a libel suit against a federal executive officer . . . ." 498 F.2d at 1159, n. 11.

In *Rowley v. McMillan*, 502 F.2d 1326 (1974), the Fourth Circuit specifically applied *Scheuer* to a suit brought against federal officers for violation of First and Fourth Amendment rights.

The Second Circuit, in addition to its persuasive opinion in the instant case, has applied the *Scheuer* doctrine of qualified immunity to federal officials in *Black v. United States*, 534 F.2d 528 (1976). See also, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F.2d 1339, 1346-47 (2d Cir. 1972), a case decided prior to *Scheuer*.

Thus it seems clear that the courts of appeals that have treated the matter see no reason to apply a different rule of immunity to federal and state officers. This is not a case in which ". . . a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter. . . ." Supreme Court Rule 19(1)(b).

V.

The petition broadly seeks immunity for virtually all of the petitioners, asserting that they were acting in judicial or prosecutorial capacities (Petition, 18-20). This assertion is ludicrous in view of the absence of any proof of the roles these various petitioners played in taking action against the respondents. The District Court has not permitted discovery, although interrogatories have been pending for some time, and respondents have made numerous attempts to obtain discovery by other means during these proceedings. In fact, the motion to

dismiss was made immediately after the respondents filed and served their interrogatories. The assertion in footnote 15 on page 19 of the petition, that petitioner Lyng, who issued the complaint (assuming that to be the correct description of his role in this matter) is absolutely immune from suit, would not seem to be consistent with the holding of the cases. Similarly, petitioner Caldwell, who, it is asserted, participated in the initiation of the prosecution, would, in order to obtain any sort of immunity, have to prove that he was involved in a discretionary activity, was acting in good faith, and was acting in a prosecutorial fashion.

The petition further asserts that ". . . the decision to make an investigation is a preliminary step looking to the administrative enforcement proceedings." *Id.* By that analogy, a vast number of government officials would be absolutely immune from suit because at one time or another they are involved in fact-finding activities which could in turn lead to information that may result in administrative enforcement proceedings. Certainly, no decision after *Scheuer v. Rhodes, supra*, and perhaps no prior decision, has granted such a broad scope of immunity to officials of the executive branch, or any other officials.

CONCLUSION

It appears that the courts of appeals of the various circuits are unanimous in holding that federal executive officers do not enjoy absolute immunity from suit. *Barr v. Matteo, supra*, reduced the availability of immunity. Courts of appeals treating the issue since *Scheuer* have uniformly held that executive officials, whether they be state officers in a §1983 suit or federal officials, do not enjoy absolute immunity from suit.

It has further been clearly held that a motion to dismiss alleging governmental immunity requires a factual foundation. Thus the District of Columbia Circuit Court in *Apton v. Wilson*,

supra, noted that even in a motion for summary judgment, which presumably would have to be backed by certain factual assertions, the plaintiffs would ". . . have an opportunity to proceed under Rule 56 including motion for discovery, to establish a genuine issue as to a material fact." 506 F.2d at 95, n. 13.

One can scarcely imagine a case less ready for consideration by this Court, in that it raises no fundamental issues of law, presents inadequate facts, and has been the subject of a court of appeals decision consistent with all other opinions of the other courts of appeals in almost every respect, and also consistent with the decisions of this Court. Clearly, this case should be remanded for discovery and further proceedings. The petition should be denied.

Respectfully submitted.

LAW OFFICES OF DAVID C. BUXBAUM, P.C.

David C. Buxbaum
Attorney for Respondents

January, 1977.

APPENDIX A

NOTICE OF MOTION TO DISMISS SECOND AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARTHUR N. ECONOMOU, *et al.*,

Plaintiffs,

-v-

UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,

72 Civ. 478 (LFM) Defendants.

S I R :

PLEASE TAKE NOTICE that upon the memorandum of law and the opinion of the judicial officer of the United States Department of Agriculture submitted herewith, and upon all prior proceedings and papers filed herein, the defendants will move pursuant to Rule 12(b) of the Federal Rules of Civil Procedure for an order dismissing the second amended complaint on the ground that as to the individual defendants it is barred by the doctrine of official immunity and as to the government agency defendants it is barred by the doctrine of sovereign immunity, at a motion term to be held before the Honorable Lloyd F. MacMahon, United States District Judge, in the United States Courthouse, Foley Square, New York, New York, on the 4th day of April 1975, or as soon thereafter as counsel may be heard.

Appendix A

You are required to serve your answering papers upon the attorney for the defendants on or before April 2, 1975 at 4:00 P.M.

Dated: New York, New York

March 20, 1975

Yours, etc.,

PAUL J. CURRAN
United States Attorney for the
Southern District of New York,
Attorney for Defendants

APPENDIX B

DECISION OF COURT OF APPEALS

Arthur N. ECONOMOU

and

Arthur N. Economou & Co., Inc.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

No. 759, Docket 73-1221.

United States Court of Appeals, Second Circuit.

Appendix B

Argued March 28, 1974.

Decided March 28, 1974.

Former futures commission merchants under the Commodity Exchange Act petitioned for review of Department of Agriculture order suspending them and enjoining them from operating as commission merchants without the minimum financial requirements established by regulation. The Court of Appeals held that where essential finding of willfulness was made in a proceeding instituted without customary warning letter, finding of willfulness was erroneous and sanctions imposed unwarranted.

Petition granted and order set aside.

Exchanges Key 5(2)

Where finding of willfulness in proceeding to suspend futures commission merchants under the Commodity Exchange Act was made in a proceeding instituted without the customary warning letter which judicial officer conceded might have resulted in prompt correction of the claimed insufficiencies, finding of willfulness was erroneous and 90-day suspension unwarranted. Commodity Exchange Act, §1 et seq., 7 U.S.C.A. §1 et seq.

Arthur N. Economou, petitioner pro se.

Jackson & Kupperman, Brooklyn, N.Y., on the brief for petitioner Corp.

Irving Jaffe, Acting Asst. Atty. Gen., Civil Div., Dept. of Justice (Morton Hollander and Michael H. Stein, Attys., Civil Div., Dept. of Justice, Washington, D.C., of counsel), on the brief for respondent.

Appendix B

Before KAUFMAN, Chief Judge, and SMITH and ANDERSON, Circuit Judges.

PER CURIAM:

Petitioners, who are no longer in business as futures commission merchants under the Commodity Exchange Act seek review of a 90-day suspension order, advancing numerous grounds, including estoppel, lack of evidence of violation and of willfulness. We need not address most of these, since it appears that the essential finding of willfulness, now passionately protested, was made in a proceeding instituted without the customary warning letter, which the Judicial Officer conceded might well have resulted in prompt correction of the claimed insufficiencies. Under these circumstances, the finding of willfulness appears erroneous on the record taken as a whole, and the sanctions imposed unwarranted.

The petition for review is granted and the order set aside.

APPENDIX C

SECOND VERIFIED AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Arthur N. Economou
Arthur N. Economou & Co., Inc.
The American Board of Trade, Inc.

Plaintiffs,

v

UNITED STATES DEPARTMENT OF AGRICULTURE; EARL L. BUTZ, Secretary of Agriculture; RICHARD T. LYNG, Assistant Secretary of Agriculture, COMMODITY EXCHANGE AUTHORITY; ALEX C. CALDWELL, Act Administrator, Commodity Exchange Authority; CHARLES E. ROBINSON, Director, Compliance Division, Commodity Exchange Authority; RICHARD E. KIRCHHOFF, Deputy Director, Registration and Audit Division, Commodity Exchange Authority; JACK W. BAIN, Chief Hearing Examiner, United States Department of Agriculture; RICHARD W. DAVIS, JR., Counsel, United States Department of Agriculture; T. REED McMINN, Regional Administrator, New York Regional Office, Commodity Exchange Authority; CLEMENT GROSS, Auditor, Commodity Exchange Authority; MURRAY A. WOLKIS, Auditor, Commodity Exchange Authority; EDWARD F. FITZPATRICK, Auditor, Commodity Exchange Authority, DONALD A. CAMPBELL, Judicial Officer, United States Department of Agriculture.

Defendants.

Appendix C

CIVIL ACTION NO. 72 Civ. 478

L.F.M.

1. This proceeding is brought in part pursuant to Section 1331, 2201, 2202 of Title 28 of the United States Code and the relevant provisions of the Federal Tort Claims Act 28 USC 1291 ff; Section 1583 of Title 42 of the United States Code; Section 10 (b) of the Administrative Procedure Act (5 USC 703); and the First and Fifth Amendments of the Constitution of the United States and such other Constitutional and Federal laws as may be relevant hereto.

2. Plaintiffs, The American Board of Trade, Inc. (hereinafter "ABT"), and Arthur N. Economou & Co., Inc. (hereinafter "ANE Inc") are corporations incorporated under the laws of the State of Delaware and having their principal office and place of business at 286 Fifth Avenue, New York, N.Y.

3. Plaintiff Arthur N. Economou (hereinafter "ANE") is an individual, resident of New York, with resident address at 115 E. 87th Street, New York, N.Y.

4. Defendants are the United States Government, its agencies, and employees thereof, some of whom are investigative or law enforcement officers thereof, who, acting in their ministerial capacity, did conspire to interfere with and violate, and did interfere with and violate, Plaintiffs' rights and privileges, and did deprive Plaintiffs of their property without due process of law, in conflict with the laws and Constitution of the United States, as more fully appears hereinbelow.

5. Defendants, Department of Agriculture acting through the Defendant Commodity Exchange Authority and the officers thereof, instituted proceedings against Plaintiffs ANE and ANE Inc. on February 19, 1970, and June 22, 1970, alleging that, as of

Appendix C

certain dates, in 1969 and 1970 ANE Inc. failed to meet certain requirements applicable to "futures commission merchants" registered under the Commodity Exchange Act. Some time before the issuance of the February 19 complaint, Plaintiff ANE and ANE Inc. had ceased to engage in the activities regulated by Defendants, and several weeks prior to such complaint Defendants had confirmed that ANE Inc., then a registrant, was in conformity with all legal requirements. Defendants issued the June 22 amended complaint against ANE and ANE Inc. at a time when they were no longer subject to regulation by Defendants in respect of the acts about which they complained. Defendants issued each of the complaints without the notice of warning required by law.

6. Prior to the issuance of Defendants' illegal complaints and throughout their improper proceedings against ANE and ANE Inc., Plaintiffs and their affiliates were sharply critical of the staff and operations of Defendants and carried on a vociferous campaign for the reform of Defendant Commodity Exchange Authority to obtain more effective regulation of commodity trading.

7. Defendants furnished the complaints to interested persons without furnishing Plaintiffs' ANE and ANE Inc. answers as well, and the New York office of the Defendant CEA failed to include such answers and other papers in the record in its file made available to the public.

8. Following the issuance of the amended complaint, Defendants issued a deceptive press release that falsely indicated to the public that Plaintiffs' ANE and ANE Inc. financial resources had deteriorated, and Defendants knew that their statement was untrue and so acknowledge previously that said assertion was untrue.

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9. On January 8, 1973, Defendant Donald A. Campbell issued a final Decision and Order adopting verbatim the sanctions recommended by Defendant Bain and the complaints in the original action against the Plaintiffs herein. Though Plaintiffs had not for some years either been registered as futures commission merchants or otherwise subject to Defendants' regulatory authority, Defendants suspended ANE Inc.'s "registration", required ANE and ANE Inc. to cease and desist from violating requirements applicable only to registrants and denied them trading privileges on contract market for 90 days.

10. In the petition for review of Defendants' Decision and Order brought by ANE and ANE Inc., *Arthur N. Economou and Arthur N. Economou & Co., Inc. v. U.S. Department of Agriculture*, 759 F.2d 2415 (2d Cir. 1974), the Circuit Court of Appeals set aside Defendants' Decision and Order and dismissed their proceedings against ANE and ANE Inc. with prejudice, holding that the prosecution of the complaints was unlawful under federal law.

11. The federal courts have consequently decided that the actions of Defendants against ANE Inc. and ANE were outside the discretionary functions or duties of Defendants.

12. ANE Inc. and ANE's Motion for Taxation of Costs, pursuant to the Federal Rules of Appellate Procedure, to recover the costs they incurred in connection with their defense of the unlawful complaints, has been denied by the Court of Appeals for the Second Circuit, so that out-of-pocket costs in the aggregate amount of approximately $30,000 which such Plaintiffs expended in their defense have not been recovered by them.

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FOR A FIRST CAUSE OF ACTION

13. By bringing unauthorized proceedings against Plaintiffs ANE and ANE Inc. without notice or warning as required by law, Defendants violated the rights and privileges of the Plaintiffs under law and the United States Constitution, including their rights to due process of law.

14. By bringing unauthorized proceedings against the Plaintiffs ANE and ANE Inc., when they knew said Plaintiffs were leaving their jurisdiction, Defendants, in excess of their lawful authority, violated the rights and privileges of the Plaintiffs under law and the United States Constitution.

15. By bringing unauthorized proceedings against the Plaintiffs ANE and ANE Inc. when Plaintiffs were no longer subject to their jurisdiction, Defendants, in excess of their discretionary powers, violated the rights and privileges of the Plaintiffs under law and the United States Constitution.

16. By these unauthorized actions outside their discretionary functions and duties, Defendants sought to suppress legitimate business activities of the Plaintiffs directly or indirectly that Congress did not give them authority to regulate, punish the Plaintiffs and accomplish the ruin of their business reputation, through harassing them, causing them to expend large amounts of time and money and publicizing the illegal complaint and order, issuing press releases that were not accurate.

FOR A SECOND CAUSE OF ACTION

17. The Defendants, in excess of their regulatory authority and their discretionary functions and powers, did issue administrative orders, illegal and punitive in nature, against the

Plaintiffs after Plaintiffs ANE and ANE Inc. were no longer subject to their authority, deliberately causing the Plaintiffs substantial personal and economic harm, as aforesaid.

FOR A THIRD CAUSE OF ACTION

18. By the aforesaid unauthorized and illegal activities, which caused Plaintiffs to deplete financial and human resources, the Defendants discouraged and chilled the campaign of criticism Plaintiffs ANE and ANE Inc. directed against them, and thereby deprived the Plaintiffs of their rights to free expression guaranteed by the First Amendment of the United States Constitution.

FOR A FOURTH CAUSE OF ACTION

19. By furnishing their complaints to interested persons without furnishing Plaintiffs' ANE and ANE Inc. answers as well and by failing to include Plaintiffs' ANE and ANE Inc. answers and other papers in the file made available to the public by Defendants, Defendants exceeded their authority in violation of Section 9 (a) of the Administrative Procedure Act, 5 USC 558 (b), and, in violation of Plaintiffs' ANE and ANE Inc. rights to due process of law and right to privacy guaranteed by the United States Constitution, sought to subject Plaintiffs' unregulated business affairs to harm, discredit them and interfere with their non-regulated business operations.

FOR A FIFTH CAUSE OF ACTION

20. By issuing a deceptive press release to the media that falsely indicated the Plaintiffs' ANE and ANE Inc.'s financial resources had deteriorated, when Defendants knew or should have known they did not, Defendants violated Plaintiffs' ANE and ANE Inc's right to due process of law, for the news release by ministerial officials damaged Plaintiffs' ANE and ANE Inc's

credit standing and put pressure on Plaintiffs' staff to counter the false charges to which the release was devoted, and had a serious affect upon the Plaintiffs' public standing, the willingness of customers to do business with him and the business as with which he was associated.

FOR A SIXTH CAUSE OF ACTION

21. Those Defendants who were law enforcement and investigative officers, acting in their ministerial capacity did act outside the scope of their authority and abuse legal process by continuing to prosecute unlawfully brought complaints against Plaintiff ANE and ANE Inc. and demanding sanctions against them when they were no longer under governmental jurisdiction.

FOR A SEVENTH CAUSE OF ACTION

22. Defendants who were law enforcement and investigative officers, acting in their ministerial capacity did act outside the scope of their authority and maliciously prosecute Plaintiffs ANE and ANE Inc. as aforesaid.

FOR AN EIGHTH CAUSE OF ACTION

23. Defendants, by wrongfully causing the publishing of false information about the Plaintiffs ANE and ANE Inc. and wrongfully making public distorted information available about the Plaintiffs, did invade the privacy of the Plaintiffs and caused them injury.

FOR A NINTH CAUSE OF ACTION

24. Defendants did negligently and with intent to harm the Plaintiffs, ANE and ANE Inc. publish information about the Plaintiffs causing the Plaintiffs harm.

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FOR A TENTH CAUSE OF ACTION

25. Defendants did in excess of their authority upon the facts stated hereinabove, trespass on Plaintiffs ANE, ANE Inc. and ABT property.

26. By reason of all of Defendants' illegal actions, Plaintiffs ANE, ANE Inc. and ABT and their business incurred heavy financial and emotional burdens and were damaged immeasurably, as were all institutions with which the Plaintiffs had a substantial connection.

WHEREFORE, Plaintiff demands:

A. Judgment against the Defendants for the costs and expenses incurred by Plaintiffs ANE and ANE Inc. in defending themselves against the Defendants' illegal activities in the amount of $30,000; and

B. Compensatory damages for injury to the business of the Plaintiffs in the amount of $5,000,000; and

C. Compensatory damages for the interference on the civil rights of the Plaintiffs in the amount of $4,000,000; and

D. Compensatory damages for the invasion of Plaintiffs privacy in the amount of $4,000,000.

E. Compensatory damages for malicious prosecution of Plaintiffs in the amount of $4,500,000.

F. Compensatory damages for abuse of process against the Plaintiffs in the amount of $6,000,000.

G. Compensatory damages for the trespass of the Defendants in the amount of $500,000.

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H. Compensatory damages for taking of the property of Plaintiffs in the amount of $8,000,000.

That this court grant such other and further relief as may be just and proper.

Dated: New York, New York
March , 1975

David C. Buxbaum
Attorney for Plaintiffs
Suite 510, 111 Broadway
New York, New York 10006
(212) 349-5780

STATE OF NEW YORK (
(SS:
COUNTY OF NEW YORK (

Arthur N. Economou, being first duly sworn deposes and says:

Deponent is an officer of all the Plaintiff corporations in this action and a Plaintiff in this action; Deponent has read the foregoing Amended Verified Complaint and knows the contents thereof; and the same is true to the Deponent's own knowledge, except as to the matters therein stated to be upon information and belief and as to these matters Deponent believes them to be true.

This verification is made by Deponent because Plaintiffs aside from Deponent are corporations and Deponent is an officer of said corporations.

Sworn to before me this March, 1975

s/ Arthur N. Economou
Arthur N. Economou